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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. JORGE ACOSTA et al., Defendants and Appellants.	B221336 (Los Angeles County Super. Ct. No. LA060736)

APPEALS from a judgment of the Superior Court of Los Angeles County, David Gelfound, Judge. Affirmed.

Jolene Larimore, under appointment by the Court of Appeal, for Defendant and Appellant Jorge Acosta.

Marta I. Stanton, under appointment by the Court of Appeal, for Defendant and Appellant Rodolfo Covarrubias.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Steven D. Matthews and Timothy M. Weiner, Deputy Attorneys General, for Plaintiff and Respondent.

Jorge Acosta and Rodolfo Covarrubias were convicted by a jury of robbery and multiple counts of assault with a firearm with true findings on related firearm-use and criminal street gang enhancements. On appeal Acosta contends the evidence is insufficient to support his convictions on the charged offenses and the trial court erred in permitting unduly prejudicial expert testimony regarding the activities of a criminal street gang. Covarrubias joins in the issues raised by Acosta and also requests this court review the sealed record of the in camera hearing conducted by the trial court under Evidence Code section 1043 and *Pitchess v. Superior Court* (1974) 11 Cal.3d 531. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Charges*

In an amended information filed June 22, 2009 Acosta and Covarrubias were charged with one count of second degree robbery (Pen. Code, § 211,[1] count 1) and five counts of assault with a firearm (§ 245, subd. (a)(2), counts 2, 3, 4, 5, 6). It was specially alleged that Covarrubias had personally used a firearm and that a principal had personally used a firearm in the commission of the robbery pursuant to various firearm-use statutes, including section 12022.53, subdivisions (b) and (e)(1). It was further specially alleged that both Acosta and Covarrubias had personally used a firearm in the commission of the aggravated assaults. The information also specially alleged all six offenses were committed to benefit a criminal street gang.[2]

Covarrubias alone was also charged with the unlawful possession of a firearm by a felon (§ 12021, subd. (a)(1), count 7) and two counts of unlawfully carrying a loaded firearm—by a felon and by an active member of a criminal street gang (§ 12031, subd. (a)(1), counts 8 and 9). The information alleged each of these additional offenses

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[1] Statutory references are to the Penal Code unless otherwise indicated.

[2] For simplicity on occasion this opinion uses the shorthand phrase "to benefit a criminal street gang" to refer to crimes that, in the statutory language, are committed "for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members." (§ 186.22, subd. (b); see *People v. Jones* (2009) 47 Cal.4th 566, 571, fn. 2.)

was committed to benefit a criminal street gang. Finally, it was alleged Covarrubias had suffered one prior serious or violent felony conviction within the meaning of the "Three Strikes" law (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)) and section 667, subdivision (a)(1), and had served two separate prison terms for prior felony convictions (§ 667.5, subd. (b)).

Both Acosta and Covarrubias pleaded not guilty and initially denied all the special allegations. Trial of the special allegations concerning Covarrubias's prior convictions was bifurcated.

Prior to trial count 9, unlawful possession of a loaded firearm by an active member of a criminal street gang, was dismissed on the People's motion pursuant to section 1385. Following a motion to dismiss pursuant to section 1181.1, count 6, aggravated assault on Carlos Guzman, was also dismissed. Covarrubias waived his right to a jury and admitted the prior conviction and prior prison term allegations.

2. *Summary of the Evidence Presented at Trial*

a. *The People's evidence*

On December 2, 2008 Raul Zaragoza and friends played soccer at Sun Valley Park, which is located between San Fernando Street and Vineland Street in the San Fernando Valley. At approximately 9:30 p.m., after they had finished their games, Zaragoza sat on the ground to change his clothes. Two men approached the group: One man (subsequently identified as Covarrubias) wore a hooded shirt, black pants, white tennis shoes and white gloves with black dots. He had a tattoo on his neck. The second man (subsequently identified as Acosta) wore long shorts, a hooded sweatshirt and white gloves with black dots. The first man said, "Que rifan?" which was understood to ask what gang the soccer players belonged to. One of Zaragoza's friends responded they were just Mexicans. The man replied, "Well, here the Vineland Boys rule." At this point the man spoke directly to Zaragoza, who had been using his cellular telephone, and asked, "What are you laughing at?" Zaragoza told him he had been listening to his messages. The man demanded Zaragoza's cell phone and tried to grab it. When

Zaragoza resisted, the man removed a black handgun from his waistband, placed it against Zaragoza's temple and threatened him. Zaragoza then turned over the phone.

As the robbery of Zaragoza was in progress, the second man pulled a chrome handgun from his waistband and ordered the others at the scene—including Miguel Cuevas, Carlos Wong and Omar Cortez—to get on the ground. However, Cuevas was able to separate from the group, move toward his car, retrieve his cellular telephone and call the police emergency number. The two assailants walked away toward another area of the park.

Los Angeles Police Officer Guillermo Gutierrez and his partner responded to a radio call of a robbery in progress. As he approached the park, Gutierrez saw Acosta and Covarrubias, who matched the description of the robbery suspects. When Acosta and Covarrubias saw Gutierrez's car coming toward them, they started to run. Acosta handed Covarrubias a handgun; Covarrubias then threw two handguns over a nearby fence. Gutierrez and his partner quickly detained both men, who were wearing white gloves. Acosta had a loaded .32-caliber magazine in his front left pocket at the time of his arrest. After taking the men into custody, Gutierrez recovered the two handguns that had been discarded: One was a .32-caliber stainless steel semiautomatic; the other a blue steel nine-millimeter handgun.

Cuevas and Cortez identified both Acosta and Covarrubias at a field show-up but were not able to confirm their identifications in court. Zaragoza identified Covarrubias at both the field show-up and in court, but was uncertain whether Acosta had been the second assailant. Zaragoza indicated Acosta's weight, hair color and basic features were a match, but he could not be sure.

Los Angeles Police Detective John Franco testified as a gang expert and discussed general gang culture, explained that asking where someone is from is a challenge to determine whether the person confronted belongs to a rival gang and described the Vineland Boys gang, its territory and activities. According to Franco, Covarrubias had been identified as a Vineland Boys gang member. Although Acosta did not claim gang

membership, he had a street name or moniker of "little Malo" and had a "SV" tattoo (for the "Sol Valle" or Sun Valley clique of the Vineland Boys). Franco opined that both Covarrubias and Acosta were members of the Vineland Boys criminal street gang and, in response to a hypothetical paralleling the People's evidence at trial, opined that the crimes were committed to benefit a criminal street gang.

b. *The defense's evidence*

Neither Acosta nor Covarrubias testified in his own defense. Armando Almaguer, called as a witness by Covarrubias, testified he owns a catering truck ("taco shop") that Covarrubias patronizes. Although the truck had just been repaired and was not open for business, Covarrubias approached the truck, which was parked in front of Almaguer's residence on Dora Street, looking for food around 9:00 p.m. on December 2, 2008. He stayed for 15 or 20 minutes. Covarrubias was at the taco shop with another man who Almaguer had seen before, not with Acosta. Almaguer claimed he did not know or recognize Acosta.[3] After Covarrubias left, Almaguer went inside his house. A short time later he heard "noise with patrol cars and all this commotion."

The supervisor of inmate property at the Los Angeles County jail testified that, at the time he was arrested, Covarrubias was wearing a black short-sleeve T-shirt, a white tank top, blue jeans and black tennis shoes. A certified Spanish-language interpreter who has worked in many gang-related trials testified she had not heard the phrase "que rifan" before and specifically had never heard it used in a gang context to mean "where are you from?"

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[3] As a rebuttal witness the People recalled Detective Franco, who had spoken to Almaguer immediately before Almaguer's testimony. According to Franco, Almaguer said he had known Acosta for approximately 18 months and had seen Acosta and Covarrubias together on prior occasions.

3. *The Jury's Verdict and Sentencing*

Both Acosta and Covarrubias were found guilty of robbery and the four remaining aggravated assault charges. Covarrubias was also found guilty of the two remaining charges of unlawful possession of a firearm. All the special allegations submitted to the jury were found true.

Acosta was sentenced to an aggregate state prison term of 26 years;[4] Covarrubias to an aggregate state prison term of 41 years.[5] No challenge to the trial court's computation of either sentence is raised in these appeals.

DISCUSSION

1. *Substantial Evidence Supports Acosta's Convictions*

To assess a claim of insufficient evidence in a criminal case, "we review the whole record to determine whether any rational trier of fact could have found the essential elements of the crime or special circumstances beyond a reasonable doubt. [Citation.] The record must disclose substantial evidence to support the verdict—i.e., evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support

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[4] The court sentenced Acosta to the middle term of three years for the robbery of Zaragoza, plus a 10-year firearm-use enhancement and an additional 10-year criminal street gang enhancement. The court then imposed three consecutive one-year terms (one-third the middle term of three years) for the aggravated assaults on Cuevas, Wong and Cortez. Sentence for the aggravated assault on Zaragoza was stayed pursuant to section 654, as were the other sentencing enhancements.

[5] The court sentenced Covarrubias to the upper term of five years, doubled pursuant to the Three Strikes law, for the robbery of Zaragoza, plus a 10-year firearm-use enhancement, a 10-year criminal street gang enhancement and a five-year enhancement pursuant to section 667, subdivision (a)(1). The court then imposed three consecutive two-year terms (one-third the middle term of three years, doubled) for the aggravated assaults on Cuevas, Wong and Cortez. The court struck the two prior prison term enhancements and stayed sentence pursuant to section 654 on all other counts and sentencing enhancements.

of the judgment the existence of every fact the jury could reasonably have deduced from the evidence. [Citation.] 'Conflicts and even testimony [that] is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence. [Citation.]' [Citation.] A reversal for insufficient evidence 'is unwarranted unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support"' the jury's verdict." (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.)

Acosta contends there was insufficient evidence to support his convictions because the victims of the crimes were unable to identify him at trial.[6] In addition, he notes the victims' descriptions of his clothing did not match what he was wearing when he was taken to the county jail following his arrest and asserts, without elaboration, the field show-up at which both Cuevas and Cortez identified him as one of the assailants was an unduly suggestive procedure.

It is well settled that the testimony of a single witness, if believed by the finder of fact, is sufficient to support a conviction. (See Evid. Code, § 411 ["[e]xcept where additional evidence is required by statute, the direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact"]; *People v. Young* (2005) 34 Cal.4th 1149, 1181 ["unless the testimony is physically impossible or inherently improbable, testimony of a single witness is sufficient to support a conviction"].) Thus, a single witness's identification of the defendant may be sufficient to sustain his or her conviction. (See *People v. Boyer* (2006) 38 Cal.4th 412, 480 ["[i]dentification of the

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[6] As the People note, although Covarrubias has joined in the issues raised and arguments made on appeal by Acosta to the extent they apply to him (see Cal. Rules of Court, rule 8.200(a)(5)), Acosta's challenge to the sufficiency of the evidence is limited to the adequacy of the out-of-court identifications linking him to the crimes. Unlike Acosta, Covarrubias was identified as one of the two assailants both at the scene and in court.

defendant by a single eyewitness may be sufficient to prove the defendant's identity as the perpetrator of a crime"].) Even if a witness has made an out-of-court identification but is unable to confirm that identification at trial, the evidentiary value of the out-of-court identification is not necessarily negated. (See *ibid*. [out-of-court identification "can, by itself, be sufficient evidence of the defendant's guilt even if the witness does not confirm it in court"]; *People v. Cuevas* (1995) 12 Cal.4th 252, 257, 267-269, 271-272.)[7]

To the extent there are any weaknesses in an eyewitness identification, the weight to be given the witness's testimony is for the jury to determine. (See *People v. Elwood* (1988) 199 Cal.App.3d 1365, 1372; *People v. Hawkins* (1968) 268 Cal.App.2d 99, 103.) An identification need not be free from doubt to have evidentiary value. (See, e.g., *People v. Midkiff* (1968) 262 Cal.App.2d 734, 740 ["identification of the defendant need not be positive"]; *People v. Robarge* (1952) 111 Cal.App.2d 87, 98 ["fact that a witness may to some extent qualify his testimony as to identification, goes to the weight of such testimony and is addressed to the sound discretion of the triers of fact"].) Indeed, a witness's statements that a suspect resembled or looked like the culprit may be sufficient

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[7] Courts have long been troubled by the implications of eyewitness fallibility. For years, California courts were bound by a rule barring reliance on a testifying witness's out-of-court identification "that cannot be confirmed by an identification [of the defendant] at the trial . . . in the absence of other evidence tending to connect the defendant with the crime." (*People v. Gould* (1960) 54 Cal.2d 621, 631, overruled by *People v. Cuevas*, *supra*, 12 Cal.4th at p. 275 ["sufficiency of an out-of-court identification to support a conviction should be judged by the substantial evidence test"].) In *Cuevas* the Supreme Court explained the *Gould* corroboration requirement failed to take into account "the many varied circumstances that may attend an out-of-court identification and affect its probative value. These circumstances include, for example: (1) the identifying witness's prior familiarity with the defendant; (2) the witness's opportunity to observe the perpetrator during the commission of the crime; (3) whether the witness has a motive to falsely implicate the defendant; and (4) the level of detail given by the witness in the out-of-court identification and any accompanying description of the crime." (*Cuevas*, at p. 267.) Under *Cuevas*, therefore, a reviewing court should assess the circumstances of the out-of-court identification to determine whether it is sufficiently probative to support the conviction under the substantial evidence standard. (*Id.* at pp. 269, 271, 274.)

evidence. (See *People v. Wiest* (1962) 205 Cal.App.2d 43, 45 ["[t]estimony that a defendant 'resembles' the robber [citation] or 'looks like the same man' [citation] has been held sufficient"].) Ultimately, "[t]he question of identification of the perpetrator of a crime is one for determination by the trier of fact and unless the evidence of identity is so weak as to constitute no evidence at all this court cannot set aside the decision of the trial court." (*People v. Kittrelle* (1951) 102 Cal.App.2d 149, 154; accord, *People v. Shaheen* (1953) 120 Cal.App.2d 629, 637.)

Here, the field identification of Acosta by two of his victims and the statement by a third victim that Acosta's weight, hair color and basic features matched those of Covarrubias's accomplice were not the only evidence linking Acosta to the robbery and aggravated assaults. He was in the company of Covarrubias, who was positively identified in court by one of the victims, shortly after the crimes were committed. Both men fled when Officer Gutierrez and his partner approached them. Moreover, both men were carrying handguns and attempted to dispose of them when they saw the officers; indeed, Acosta still had a loaded .32 caliber magazine in his pocket at the time of his arrest. Finally, the jury was presented with the vigorous cross-examination of the crime victims by defense counsel, who contended Acosta had been misidentified. The jury nevertheless concluded Acosta had committed the offenses—a verdict that was supported by substantial evidence. (*People v. Keltie* (1983) 148 Cal.App.3d 773, 782; see *In re Gustavo M.* (1989) 214 Cal.App.3d 1485, 1497 ["when the circumstances surrounding the identification and its weight are explored at length at trial, where eyewitness identification is believed by the trier of fact, that determination is binding on the reviewing court"].)

2. *The Court Did Not Commit Prejudicial Error In Allowing the People's Gang Expert To Testify Regarding the Activities of the Vineland Boys*

Acosta's counsel actively sought to limit the nature and scope of the evidence presented to the jury by the People's gang expert, Detective Franco. For example, she successfully moved to exclude testimony that Acosta may have painted gang graffiti on his holding cell walls, but failed to keep out testimony concerning the significance of the

number 13 to Hispanic street gangs and the number's relationship to the Mexican Mafia prison gang (the letter M is the 13th letter of the alphabet). In addition, at the request of Acosta's counsel the court informed the jury that a disturbance in the courtroom next door was unrelated to gang activity. Without objection, however, Franco testified, "I'm familiar with the Vineland Boys from working Van Nuys division and working Foothill and working North Hollywood. The Vineland Boys are a very violent street gang, probably the most violent street gang in the San Fernando Valley. . . . I was part of the 2004 Operation Silent Night where 25 military agencies came together with 1300 officers to serve over 40 warrants on the Vineland Boys, and that was due to the murder of Matthew Pavelka, a Burbank police officer." Again without objection, when asked whether Sun Valley Park is within Vineland Boys territory, Franco responded, "That park, Sun Valley Park, is Vineland Boys territory. There was a—there was actually a little shrine up there for Tina Kerbrat, the first female officer killed on the job, and that little sign gets tagged up all the time, 'F-you,' 'Fuck you police' is crossed out and they put 'VBS.'" As Franco started to cite another example, although there still was no objection or motion to strike from Acosta's counsel, the court interrupted, "Okay. Next question."

On appeal Acosta contends it was prejudicial error to allow the jury to be informed "of the most heinous offenses committed by a gang member, not particularly connected to appellant," apparently (but not clearly) referring to the gang murder of Officer Pavelka and perhaps the desecration of the memorial to Officer Kerbrat. Yet, as the People argue, in the absence of a timely and specific objection to this testimony, Acosta has forfeited his appellate challenge to the admission of the evidence. (Evid. Code, § 353 [judgment may not be reversed because of the erroneous admission of evidence unless "[t]here appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion"]; *People v. Doolin* (2009) 45 Cal.4th 390, 448; see *People v. Wilson* (2008) 44 Cal.4th 758, 793.)

In any event, evidence of past crimes committed by the Vineland Boys was necessary to establish Acosta's robbery conviction was subject to a criminal street gang enhancement under section 186.22, subdivision (b), which requires proof a gang has as one of its "primary activities" the commission of one or more of the offenses enumerated in section 186.22, subdivision (e)—including murder (§ 186.22, subd. (e)(3))—and has engaged in a "pattern of criminal gang activity" by committing two or more of those "predicate offense" within a defined time period. (§ 186.22, subds. (e), (f); *People v. Gardeley* (1996) 14 Cal.4th 605, 617.) Accordingly, even if Acosta's counsel had objected to Detective Franco's testimony concerning the killing of Officers Pavelka and Kerbrat, the only issue would be whether it was an abuse of discretion not to exclude it under Evidence Code section 352[8] because the probative value of the evidence was outweighed by its potential for undue prejudice. (See, e.g., *People v. Barnett* (1998) 17 Cal.4th 1044, 1118 ["[w]hen a trial court overrules a defendant's objections that evidence is . . . unduly prejudicial . . . , we review the rulings for abuse of discretion"]; see generally *People v. Ochoa* (2001) 26 Cal.4th 398, 437-438 ["[t]he exercise of discretion is not grounds for reversal unless '"the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice"'].)

Given the entirely proper testimony describing other violent crimes committed by the Vineland Boys, including murder, aggravated assault and robbery, any additional "prejudice" to Acosta as a result of the challenged testimony was minimal. (See *People v. Karis* (1988) 46 Cal.3d 612, 638 ["'[t]he "prejudice" referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues'"].) The trial court did not err in allowing Detective Franco to testify as he did.

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[8] Evidence Code section 352 provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

3. *The Trial Court Properly Exercised Its Discretion in Concluding There Was No Discoverable Material in Officers Gutierrez and Motts's Personnel Files*

Prior to trial Covarrubias moved under Evidence Code section 1043 and *Pitchess v. Superior Court, supra,* 11 Cal.3d 531 for a review of the personnel records of several Los Angeles police officers. The trial court granted the motion in part, agreeing to inspect the records of Officer Gutierrez and his partner, Officer Motts, to determine whether either officer had a history of misconduct regarding fabrication of evidence, falsifying police reports or bias against Hispanics.[9] The court ruled the other officers identified in the motion were not percipient witnesses and their credibility would not be an issue at trial. The court then reviewed the records in camera and found no discoverable information.

At Covarrubias's request, which Acosta has joined, we have reviewed the sealed record of the in camera proceedings and conclude the trial court satisfied the minimum requirements in determining whether there was discoverable information. No abuse of discretion occurred. (See *People v. Mooc* (2001) 26 Cal.4th 1216, 1225.)

DISPOSITION

The judgments are affirmed.

PERLUSS, P. J.

We concur:

ZELON, J. JACKSON, J.

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[9] The motion itself is not part of the record on appeal. We are able to determine the nature and scope of Covarrubia's request from the court's description at the hearing on the motion. On appeal Covarrubia does not contend the court erred in limiting the scope of its in camera inspection but simply asks us to review the sealed transcript to determine whether the court properly exercised its discretion in finding there was no discoverable material in the categories identified.